**Holmes & Narver/Morrison-Knudsen *and* International Brotherhood of Electrical Workers, AFL–CIO, Local Union 558 and UA Plumbers & Steamfitters, Local Union No. 377.** Cases 10–CA–23988 and 10–CA–24005

September 30, 1992

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On February 23, 1990, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The Charging Party filed exceptions, a supporting brief, and an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order. In adopting the judge's finding that the Respondent violated Section 8(a)(5) by failing to bargain with the Union before laying off nine employees in March 1989, we rely on the reasons set forth below.

The Respondent held the prime contract to provide operations and maintenance service at a U.S. Army facility, Redstone Arsenal. The Respondent had three departments at Redstone: logistics, support services, and engineering. The Army exercised its option not to renew the Respondent's contract, which expired September 30, 1989, and opened the contract for competitive bidding. The Respondent submitted a bid on January 6, 1989, in which the Respondent proposed performing essentially the same work it was then performing but with fewer employees. The Respondent did not notify or bargain with the Union, which represented its employees, about the bid.

The Respondent did not place its bid to the Army in evidence, and the testimony of the Respondent's witnesses does not reveal its details. It appears, however, that the bid contemplated changes in the logistics and support services departments. The engineering department, by far the Respondent's largest, was not changed.

In mid-January, the Respondent's president, Newman Howard, telephoned John Dobson, the Respondent's project director at Redstone. Howard directed Dobson to come as close as possible to the organization the Respondent had bid in its proposal, to lend credibility to its contract bid.

Dobson, who had never seen the actual bid, relayed Howard's instructions to the heads of the logistics and support services departments. Dobson testified that the directors of the logistics and support services departments had proposed to the persons writing the bid that the functions of these two departments be combined. He also stated that within the motor pool operations, which was in the logistics department, the directors had intended to have only two divisions instead of three. Dobson acknowledged, however, that the logistics and support services departments had not in fact been combined.

Dobson testified that the department heads ''recommended [to Dobson] laying off certain employees and restructuring jobs in order to reduce the total work force in accordance with the new contract proposal.'' Dobson then reviewed these recommendations and approved them.

When he was asked to describe the specific organizational changes that he had implemented, Dobson could remember only one change, and that was in the way the motor pool was structured: ''[W]e let one supervisor go and made several coordinators in lieu of him . . . .'' According to Dobson, the general job duties of the rank-and-file employees in the motor pool did not change, but an employee could be doing additional work after the pool's reorganization. Dobson testified:

> When we are combining some areas of operation, a mechanic is still a mechanic, but he may be working on some additional types of vehicles that would have been in another division previously.

These changes resulted in the motor pool's needing fewer employees.

On March 7, 1989, the Respondent notified nine employees that they were being laid off immediately. At the hearing, Dobson identified a majority of these employees as coming from the motor pool. Dobson was able to identify only one employee, a mail clerk, who was laid off from a department other than the motor pool.

The Respondent did not notify the Union in advance of the decision to lay off the employees.[2]

The judge found that the Respondent's unilateral decision to lay off the nine employees violated Section 8(a)(5). In addition to *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the judge relied on *Otis Elevator Co.*, 269 NLRB 891 (1984), and *LaPeer Foundry & Machine*, 289 NLRB 952 (1988).

We agree with the judge's conclusion that the Respondent's decision here to combine jobs, to reassign work, and to lay off employees was a mandatory sub-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] There is no evidence of any collective-bargaining agreement between the Respondent and the Union that gave the Respondent the right to lay off the employees unilaterally.

ject of bargaining and that the Respondent unlawfully failed to bargain with the Union over that decision.[3]

At the outset, we note that our decision here does not purport to establish a rule as to all layoffs. We are dealing with layoffs that are made in connection with a decision to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments. Even our concurring colleague agrees that such a decision does not fall within the category of decisions ''involving a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all,'' which the Supreme Court has clearly held to fall outside the bargaining obligation imposed by Section 8(a)(5) and Section 8(d). *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 677, citing *Fibreboard Corp. v. NLRB*, supra, 379 U.S. at 223 (Stewart, J. concurring). Thus, the Respondent did not abandon a line of business or cease a contractual relationship with a particular customer, or make any other change that significantly altered the scope and direction of its business. Indeed, the Respondent has not even demonstrated that the work in the motor pool changed appreciably.

Unlike our colleague, we are satisfied that the decision at issue here falls within the category of ''management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules,'' that are ''almost exclusively 'an aspect of the relationship' between employer and employee''; such a decision is clearly a mandatory subject. *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 677, citing *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).

The Respondent did no more than consolidate and change the jobs in the motor pool—a small unit—and lay off a few employees elsewhere. Indeed, the Respondent's decision might fairly be analogized to increasing the production quotas of certain employees so that others may be laid off. We therefore do not see the need of engaging in any extended multistep analysis to determine whether the parties must bargain over layoffs thus linked to work reassignments. See, e.g., *St. John's Hospital*, 281 NLRB 1163, 1166, 1168 (1986), enfd. 825 F.2d 740 (3d Cir. 1987) (adding significant new job duties, previously performed by others, to the work of unit employees is a mandatory bargaining subject); *Cincinnati Enquirer*, 279 NLRB 1023, 1031–1032 (1986) (phasing out job duties by transferring these duties to others, which resulted in elimination of unit position, is a mandatory subject of bargaining).

But even assuming arguendo that the decision here is what our concurring colleague characterizes as a ''third category'' decision, we would reach the same result without applying the multipart test of *Dubuque Packing Co.*, 303 NLRB 386 (1991)—a test that was devised for plant relocations, which potentially involve complicated capital decisions regarding changes of plant facilities. Like the subcontracting in *Fibreboard*, supra, the decision here did not involve capital investment, did involve labor cost considerations,[4] and, as a common subject of bargaining in industrial practice, is clearly amenable to bargaining. 379 U.S. at 213–214. See also *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 679–680. As to this last factor—amenability to bargaining—we note that even if there is no basis for wage and benefit bargaining to avert the layoffs because, as the Respondent argues, it was already providing wages and benefits at the lowest level possible under the law, we disagree that there are no other bargainable, cost-saving alternatives to downsizing. In fact, a recent survey[5] shows that many companies that downsize make efforts to minimize employee separations by implementing a variety of alternatives, which—had the Respondent been willing to bargain—the Union might have offered as concessions or accepted as proposals. Among the many alternatives to downsizing, other than reducing wages, are modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications.[6]

We also note that categorizing the decision at issue here as a mandatory subject of bargaining is in accord with the reasoning of Justice Stewart in the *Fibreboard* concurrence that was embraced by the Court in *First National Maintenance*, supra. The layoffs here are properly deemed mandatory subjects because they are integral to a decision ''closely analogous to . . . situa-

[3] Subsequent to the judge's decision, the Board overruled *Otis Elevator* in its decision in *Dubuque Packing Co.*, 303 NLRB 386 (1991). See also *Postal Service*, 306 NLRB 640 (1992). To the extent that *LaPeer* relies on *Otis Elevator*, we disavow the judge's reliance on *LaPeer*.

[4] We find no merit in the Respondent's argument that the layoffs had nothing to do with labor costs, but were merely made to add ''credibility'' to its new contract bid proposal. The Respondent did not put the bid into evidence, and in the absence of a showing that the layoffs made its bid more ''credible'' or competitive by some means other than reducing labor costs, we agree with the judge that a reduction of labor costs was a significant factor, if not the only factor, in the Respondent's decision to lay off the nine employees.

We also note that the changes allegedly included in the bid proposal were at the Respondent's own election, as a means of justifying its bid. They were not shown to be imposed by external constraints. Thus the Respondent's argument here is even less compelling than the employer's argument in *Postal Service*, 306 NLRB 640 (respondent not justified in unilateral reduction of hours as means of satisfying Congressional reduction in budget).

[5] *Lessons Learned, Dispelling the Myths of Downsizing*, Right Associates (1992).

[6] This is, of course, not to say that one approach is necessarily better than another. The bargaining obligation defined in Sec. 8(d) requires the Respondent only to give good-faith consideration to proposals the Union might make on the subject. *Dubuque Packing Co.*, supra.

tions within the traditional framework of bargaining.'' 379 U.S. at 224. One of the ''situations'' that Justice Stewart identified as constituting a traditional bargaining subject was ''assignment of work among potentially eligible groups within the plant.'' Id. As shown above, the layoffs here were the direct outcome of the decision to reassign work so that the same amount of work could be done by fewer employees.

In sum, we find that the decision impelling the layoffs here is a traditional subject of bargaining, properly deemed a mandatory subject without the necessity of inquiries into the impact on labor costs or the Union's ability to grant wage and benefit concessions. We accordingly adopt the judge's conclusion that the Respondent violated Section 8(a)(5) by laying off nine employees without notifying or bargaining with the Union.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Holmes & Narver/Morrison-Knudsen, Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, concurring.

I concur in my colleagues' finding that the Respondent violated Section 8(a)(5) by failing to bargain with the Union before laying off nine employees in March 1989. I disagree, however, with their analysis of the issue of whether the layoff decision was a mandatory subject of bargaining.

In analyzing whether a given management decision is a mandatory subject of bargaining, we must begin with the three categories of management decisions described by the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

As noted, the Court divided management decisions into three categories. The first category consists of management decisions, such as choice of advertising, product type and design, and financing arrangements, which ''have only an indirect and attenuated impact on the employment relationship''; there is no obligation to bargain over these decisions. In the second category are management decisions, such as ''the order of succession of layoffs and recalls, production quotas, and work rules, which are almost exclusively 'an aspect of the relationship between employer and employees'''; as to these there is an obligation to bargain. The third category consists of management decisions that have a direct impact on employment, such as the elimination of jobs, but which have as their focus only the economic profitability of the business. For these decisions, the Court held that bargaining would be required ''only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.'' Id. at 676–679.

It is my view that the Respondent's decision to lay off employees fell within the third category of management decisions. It was a decision that had as its focus only the economic profitability of the business, and this decision had a direct impact on employment. Thus, it fits within the third category.

My colleagues erroneously conclude that the decision falls within the second category of management decisions. As noted above, the second category includes ''the order of succession of layoffs.'' There is a clear distinction between a management decision concerning those matters and a management decision concerning *whether* to have a layoff. The latter decision involves the entrepreneurial judgment as to how many people will be employed. The Supreme Court was careful to exclude that kind of decision from its examples of decisions in the second category. I would adhere to the Court's careful language.

My colleagues also confuse the instant decision to lay off with the impact of that decision on those employees remaining after the layoff. There is no allegation in the case concerning a refusal to bargain about that impact.

In sum, the decision in this case falls within the third category.

If a management decision falls within the third category, bargaining is required only if the benefit of such bargaining, for labor-management relations and the collective-bargaining process, outweighs the burdens that bargaining would place on the conduct of the business. As I stated in my concurrence in *Torrington Industries*,[1] the *Dubuque* test is a burden-of-proof mechanism for applying this balancing test.[2] Although *Dubuque* involved a relocation, the opinion does not state that the test therein is confined to relocation

[1] 307 NLRB 809 (1992).

[2] In *Dubuque Packing Co.*, 303 NLRB 386 (1991), the Board announced the following balancing test for determining whether an employer's economically motivated decision to relocate unit work is a mandatory subject of bargaining: Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

causes. Indeed, the reasoning and logic of the opinion has a broader application. Accordingly, I would apply that test here.

Applying this test, I find that the General Counsel has met his burden of establishing that the Respondent's decision to lay off employees did not involve any basic change in the direction or scope of the Respondent's enterprise. I agree with the judge that the General Counsel proved that the only significant difference in the Respondent's new bid was that there would be fewer employees performing the same quantity of work. Although the Respondent characterized this as a ''reorganization,'' the judge found, and the record shows, that the Respondent's business remained essentially the same under its bid for the new contract. I thus find that the General Counsel carried his initial burden of establishing a prima facie case that the Respondent's decision was a mandatory subject of bargaining.

I further find that the Respondent failed to rebut the prima facie case. As noted above, I reject, as did the judge, the Respondent's claim that the layoffs were akin to seeking a change in the direction or nature of its business. The work to be accomplished under the new contract bid was the same as that under the old contract, and the Respondent has failed to prove that the manner of its performance was significantly different. In addition, the Respondent has failed to show that labor costs were not a factor in its decision. To the contrary, I agree with the judge, for the reasons stated by him, that the Respondent's decision to lay off employees was motivated by its desire to reduce labor costs. Finally, the Respondent has failed to establish that the Union could not have offered labor cost concessions that could have changed the layoff decision. Although, as the Respondent contends, the Respondent may have been paying its employees minimum wages and benefits, it does not follow that the Union was powerless through bargaining to affect the Respondent's decision. Had the Respondent been willing to bargain, the Union might have offered concessions other than a decrease in wages, such as modified work rules, overtime reductions, reassignment of work, and reclassifications, that would have resulted in savings to the Respondent.

In sum, although I disagree with the majority's analysis of the Respondent's obligation to bargain about its decision to lay off employees, I concur in their conclusion that the Respondent was obligated to bargain with the Union over the decision and that the Respondent's failure to do so violated Section 8(a)(5).

*Victor A. McLemore, Esq.*, for the General Counsel.
*Norman A. Quandt, Esq. (Clark, Paul, Hoover & Mallard)*, of Atlanta, Georgia, for the Respondent.
*John F. Dickerson*, of Reidsville, North Carolina, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on August 16 and 17, 1989, in Huntsville, Alabama. The charges which gave rise to this proceeding were filed on March 2 and 9, 1989, by International Brotherhood of Electrical Workers, AFL–CIO, Local 558, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 377 (the Union). An order consolidating cases, consolidated complaint and notice of hearing issued on April 14, 1989, which alleges, inter alia, that Holmes & Narver/Morrison-Knudsen (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act, as (the Act), by unilaterally reducing the amount paid into individual employee SEP accounts and by unilaterally laying off employees without notifying the Union or giving it an opportunity to bargain about these matters.

In its answer to the complaint, Respondent admitted certain allegations including the filing and serving of the charge; its status as an employer within the meaning of the Act; the status of International Brotherhood of Electrical Workers, Local 558, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 377 as labor organizations within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, all parties filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Holmes & Narver/Morrison-Knudsen is a joint venture which prior to September 30, 1989, held the prime contract with the United States Army Missile Command for the purpose of providing operations and maintenance services at the Redstone Arsenal in Huntsville, Alabama. In the course and conduct of its business operations, Respondent annually received in excess of $50,000 for the services provided by it to the U.S. Army.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. LABOR ORGANIZATION

International Brotherhood of Electrical Workers, Local Union 558 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 377 are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *Background*

Pursuant to a contract with the United States Army Missile Command, Holmes & Narver Services, Inc. and Morrison-Knudsen Services, Inc. operated as a joint venture to provide operations and maintenances services at the Redstone Arsenal in Huntsville, Alabama. Operations and maintenance services provided by Respondent included operation and maintenance of boiler, heating, waste water treatment and sewage plants, maintenance on vehicles, building and grounds maintenance, operation of food service facilities, and even certain construction work.

Respondent was originally granted this service contract on a 1-year basis, with four 1-year extensions available to the Government at its option. Respondent held the contract in this manner from October 1, 1985, through September 30, 1989. Following a Board-conducted election, the Union, a joint collective-bargaining representative, was certified on December 22, 1988, in a unit described as:

> All full time and regular part-time employees engaged in construction, alterations, maintenance, repair and motor pool employees employed by Holmes & Narver/Morrison-Knudsen at the Redstone Arsenal in Huntsville, Alabama, including the administrative employees, but excluding all equipment operators, heavy mechanics, heavy mechanic helpers, temporary employees, office clerical employees employed at the headquarter's building, confidential employees, guards, and supervisors as defined in the Act.

The fourth contract extension period ran from October 1, 1989, through September 30, 1990, but the Government chose not to exercise its option to renew for that period. Instead, the Government chose to let the contract out for bid for the period beginning October 1, 1989. As is discussed in greater detail below, Respondent bid on, but did not receive, the contract beginning October 1, 1989. Accordingly, Respondent's services at the Redstone Arsenal officially terminated effective September 30, 1989.

### B. *Respondent's Past Practice Regarding Setting of Wages and Fringe Benefits*

In providing services at the Redstone Arsenal, Respondent operated pursuant to the Service Contract Act and regulations promulgated thereunder. This act requires Respondent to pay certain minimum wages and benefits as prescribed by the U.S. Department of Labor (D.O.L.). More than 400 of Respondent's 550 employees fell into this category, and were commonly referred to as ''wage board employees.'' Respondent also employed approximately 20 employees in construction related work whose wages and benefits were governed by the Davis-Bacon Act. The remaining work force consisted of supervisory and managerial personnel.

D.O.L. prepares and issues wage determinations every year reflecting prevailing Huntsville area wages and benefits for the various job classifications at the Redstone Arsenal. Although the contract between Respondent and the U.S. Army Missile Command was officially known as a ''firm fixed price'' contract, a number of price adjustment provisions are included. Among others, the contract allowed Respondent to apply for ''equity adjustments'' offsetting any increased costs of wages and benefits mandated by wage determinations issued annually by D.O.L. While these wage determinations established only minimum levels for the various job classifications, it is undisputed that Respondent, throughout the period of its contract at the Redstone Arsenal, always paid the exact minimum level of wages and benefits prescribed in these wage determinations.

When Respondent was first awarded the contract to operate and maintain the Redstone Arsenal, it made a determination from the outset to provide employees with specific fringe benefits: (1) a medical plan, (2) life insurance, (3) long-term disability insurance, (4) accidental death and dismemberment insurance, (5) jury duty leave, (6) bereavement leave, and (7) an individual SEP fund for each employee. The SEP fund was established for the specific purpose of receiving the annual residual health and welfare money which Respondent was obligated to pay pursuant to the wage determinations and which was not spent on the other fringe benefits provided. It was known at the outset, therefore, and employees were advised that contributions to SEP accounts would vary from time to time based on two factors: one, fluctuations in the total ''pool'' of health and welfare money specified in the annual wage determinations of D.O.L. and, two, the costs of the other health and welfare benefits which Respondent was providing to employees. During the life of Respondent's contract at the Redstone Arsenal, there have been numerous changes, both up and down, in the level of monthly employer contributions to individual employee SEP fund accounts. The most common reason for these changes was the result of routine monitoring of employee benefit costs and the need to adjust the contribution level to insure that the wage determination figure was reached by the end of the particular contract year. Other reasons for changes included periodic adjustments in medical insurance premiums, changes in the wage determinations issued by D.O.L., and a one-time health insurance ''rebate'' which was divided individually among employees and placed in their SEP accounts.

### C. *Events Surrounding the January 1989 SEP Fund Change*

In late September 1988, Respondent received its annual package of wage determinations from D.O.L. for the next contract year beginning October 1. On the basis of those determinations, Respondent prepared a proposed ''equity adjustment'' for increased costs called for by those determinations. Respondent submitted those proposed adjustments to the U.S. Army in late October 1988.

In mid-November 1988, during a conversation with a representative of D.O.L., Industrial Relations Manager Bill Priattie learned that a minor change in regulations effective October 1, 1988, had resulted in a major change in the formula for determining the minimum pool of money to be spent on employee health and welfare benefits. The change entailed using ''actual hours worked'' to determine the pool, which would significantly reduce the pool as it was then being formulated. From November 1988 to January 1989, a series of conversations and meetings occurred between Respondent and a representative of D.O.L. regarding calculation of this benefit pool paid to employees for health and welfare benefits. As a result of these meetings, Respondent determined that it was actually paying employees significantly

more than the minimum health and welfare benefits established in the wage determinations effective October 1, 1988. Respondent then took two actions. First, it notified the U.S. Army that its proposed equity adjustments submitted in October 1988 were erroneous and would be revised downward to reflect the correct costs utilizing the new formula. Second, Respondent notified employees that it was adjusting the level of monthly contributions to individual SEP accounts in accordance with the correct, revised formula. Industrial Relations Manager Priattie notified employees of this change by letter dated January 12, 1989. In fact, Respondent adjusted its formula in order to recoup the overpayment of benefits made to the employees' SEP accounts since October 1988.

Respondent does not contend that it notified or bargained with the Union prior to implementing this adjustment to its monthly SEP fund contribution. Rather, Respondent concedes that a meeting which it held with the Union on January 11, 1989, was simply for the purpose of giving the Union advance notice of Respondent's action and was merely for the purpose of paying a ''courtesy call'' on the Union rather than for the purpose of engaging in bargaining over this SEP account adjustment.

### D. *Events Surrounding the March 1989 Layoffs*

As indicated above, the U.S. Army chose not to exercise its option to renew the contract with Respondent beginning October 1, 1989. Instead, the Government chose to open the contract for competitive bidding. In early January 1989, Respondent submitted its formal proposal for the new service contract. In order to make its bid more attractive, Respondent proposed performing essentially the same work it had performed previously with fewer employees than called for in earlier contracts.

In mid-January 1989, Newman Howard, president of Holmes & Narver Services, Inc., telephoned John Dobson, project director for Respondent at the Redstone Arsenal, and instructed Dobson ''to attempt to get our present organization as closely as possible to that organization that we bid in our proposal.''

Following the call from Howard, Project Director Dobson contacted the heads of Respondent's logistics department and support services department. Dobson testified:

> I told them that we were directed to reorganize as closely as possible to the structure that we had bid and asked for their recommendations as to how this could be accomplished, considering the scopes of work of the two contracts. In later discussions, these two department heads recommended laying off certain employees and restructuring jobs in order to reduce the total work force in accordance with the new contract proposal.

After reviewing the recommendations of the department heads, nine employees were selected for layoff. On March 7, 1989, the nine employees were notified they were being laid off immediately.[1] All nine employees were permanently terminated. Payroll records reflect the reason for termination as ''layoff due to department reorganization.''

[1] Although the layoffs were effective immediately, the employees were paid through Friday, March 10, 1989.

During February and continuing in March 1989, Respondent and the Union held several meetings to attempt to negotiate a collective-bargaining agreement. Ironically, on March 7, Respondent and the Union held a negotiating session wherein they discussed layoff and seniority provisions of the proposed contract. Nevertheless, Respondent admits that it did not notify or offer to bargain with the Union over the March layoff.

### Analysis and Conclusions

On January 12, 1989, Respondent unilaterally reduced its contributions to individual employee SEP accounts. Respondent took this action after learning from a D.O.L. representative that a minor change in regulations affecting Respondent had resulted in a major change in the formula Respondent was required to use for determining the minimum pool of money to be spent on employee health and welfare benefits. Respondent learned that as a result of this change, it had been paying significantly more than required since October 1, 1988. The Charging Party correctly notes that D.O.L. sets only minimum levels of compensation, and D.O.L. did not require Respondent to reduce individual employee SEP account payments. The Charging Party argues that although the reduced payments were based on business considerations, since Respondent was not compelled to make them, no legal justification exists for reducing the payments unilaterally.

Respondent argues that the January 1989 adjustment in payments to SEP accounts was done within an existing framework and past practice of making such adjustments whenever changes occurred in various external factors over which Respondent had no real control. Respondent argues that because the January 1989 change occurred within this existing framework and past practice of other similar changes, Respondent was not required to first notify the Union before making that change. I find merit in Respondent's argument.

Counsel for General Counsel and the Charging Party do not dispute, and the facts clearly establish, that during the life of Respondent's contract at the Redstone Arsenal, there have been numerous changes, both up and down, in the level of monthly employer contributions to individual employee SEP fund accounts. All of these changes were precipitated by one of two factors known from the outset both to Respondent and to employees: one, fluctuations in the total ''pool'' of health and welfare money specified in the annual wage determinations of D.O.L. and, two, the cost of other health and welfare benefits which Respondent was providing to employees. It is undisputed that Respondent consistently paid the exact minimum required by annual D.O.L. ''wage determinations.''

There is no question that the revised wage determination formula effective October 1, 1988, threatened Respondent with a severe financial burden since there was no guarantee Respondent would be reimbursed by the U.S. Army for any costs exceeding the minimum required by the wage determination formula. Accordingly, Respondent reduced its payments pursuant to the revised wage determination formula just as it had increased payments in the past based on increases in those wage determinations. The significant fact is that Respondent had an established past practice and an established formula for adjusting benefit contributions in response to external changes, whether they be changes in the

pool of money specified in annual wage determinations of D.O.L. or costs of other health and welfare benefits which Respondent was providing to employees. Since Respondent had a longstanding past practice of regularly adjusting monthly SEP fund contributions pursuant to a formula which ensured that its overall year-end expenditure of health and welfare benefits met, but did not exceed, the exact bench mark set by D.O.L. wage determinations, Respondent's adherence to this past practice is not offensive to principles of good-faith bargaining in such circumstances. Accordingly, I find that Respondent's January 1989 change in the amount paid into individual employee SEP accounts did not violate Section 8(a)(1) or (5) of the Act, and I shall dismiss that allegation of the complaint.

All parties agree that resolution of the issue concerning the unilateral layoff of employees depends on the interpretation and application of *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Otis Elevator Co*., 269 NLRB 891 (1984); and *LaPeer Foundry & Machine*, 289 NLRB 952 (1988). In *Fibreboard*, supra, the Supreme Court enforced the seminal Board decision finding that before making unilateral changes, an employer was first required to notify the union representing its employees and give it an opportunity to bargain about changes in wages, hours, or working conditions ''whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on direct modification of labor costs and not a change in the basic direction or nature of the enterprise.'' Consistent with this decision, the Supreme Court in *First National Maintenance Corp*., supra, held that an employer is not required to bargain over a decision to close part of its operations, since such a change involves the basic direction or nature of the enterprise. The Court held, however, that an employer was obligated to bargain over the affects of such a decision, although not over the decision itself.

Applying these cases, the Board in *Otis Elevator*, supra, held that an employer's decision to discontinue a portion of its operations and to consolidate that portion with another portion in order to improve efficiency and marketability was based on a change in the nature of the business and not on labor costs. Accordingly, the Board found that the employer was not required by the Act to first notify the union and give it an opportunity to bargain over that decision. As they relate to the case at hand, the cited cases stand for the proposition that a layoff precipitated by a desire to reduce labor costs requires that the employer first notify and offer the union representing its employees an opportunity to bargain about that decision, while a layoff precipitated by a change in the basic direction or nature of the enterprise does not require such notification and bargaining. In *LaPeer Foundry & Machine*, supra, the Board explained the rationale behind requiring an employer to notify the union representing its employees and offer it an opportunity to bargain in situations where a layoff is precipitated by a desire to reduce labor costs. The Board explained:

> This requirement will ensure that the employees' bargaining representative will have the opportunity to propose less drastic alternatives to the proposed layoff. Moreover, the employer's duty to bargain will require meaningful negotiations concerning the decision to layoff, and not merely the notification to the Union of a decision that is a fait accompli.

Respondent suggests in its posthearing brief that ''it may be legitimately questioned whether [Respondent's] underlying motivation neatly fits into either of these two categories,'' i.e., reduction of labor costs verses a change in the nature or direction of the business. Respondent argues, ''it is apparent this action did not turn on labor costs and was more akin to seeking a change in the direction or nature of its business.'' I reject this argument, and for the reasons explained more fully below, I find that Respondent's March 1989 layoff was precipitated primarily, if not solely, by a desire to reduce labor costs.

Respondent offered no evidence that the operations and maintenance contract for which it was bidding for the period beginning October 1, 1989, had been changed in any significant way as compared to past contracts. Throughout the hearing, Respondent explained the necessity of the March 1989 layoffs by noting that in laying off these people it was ''adding credibility to the bid'' for the new contract. Project Manager Dobson admitted, however, that he never even consulted the contract bid to assure conformance with any proposed reorganization or change in structure. While Dobson claimed that he simply relied on his own understanding of what was in the bid, a gross inconsistency is suggested by the fact that layoffs were supposedly based on conformance with a new bid and were intended to lend credibility to that bid while, on the other hand, the decision makers never even looked at that bid while making their choice for layoffs. This is explained by the fact that the significant difference between Respondent's new bid and its past contracts is that in order to make its bid more attractive, Respondent proposed performing essentially the same work it had performed previously but with fewer employees. The conclusion is inescapable that Respondent's desire and intent was to reduce labor costs. The ''credibility'' which was lent to Respondent's bid by laying off employees in March 1989 was to show the U.S. Army that essentially the same work could be performed by fewer employees, thereby reducing labor costs and making Respondent's bid more competitive. Respondent attempts to avoid the obvious by arguing that the purpose for its layoff was to enhance the credibility of its contract bid. Respondent enhanced the credibility of its contract bid only by a reduction in employee costs to the Government. In the final analysis, the March 1989 layoff was precipitated by Respondent's desire to reduce labor costs. Accordingly, I find that by failing to notify the Union in advance and give it an opportunity to bargain about that decision, Respondent violated Section 8(a)(1) and (5) of the Act.[2]

[2] I also reject Respondent's argument that the Union waived its right to bargain about the effects of the layoff on employees. Any waiver of a statutory right to bargain must be clear and unmistakable. When the Union learned of the layoff, it informed Respondent that it believed Respondent had an obligation to bargain about the layoff decision. Respondent took the position, which it still takes today, that it had no obligation to bargain with the Union. Inasmuch as the decision itself was presented to the Union as a fait accompli, it can hardly be concluded that the Union waived any statutory right. *Alpha Biochemical Corp*., 293 NLRB 753 (1989).

## CONCLUSIONS OF LAW

1. Respondent Holmes & Narver/Morrison-Knudsen is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union 558 and UA Plumbers & Steamfitters, Local Union 377 are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

3. On December 22, 1988, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate collective-bargaining unit:

> All full time and regular part-time employees engaged in construction, alterations, maintenance, repair and motor pool employees employed by Holmes & Narver/Morrison-Knudsen at the Redstone Arsenal in Huntsville, Alabama, including the administrative employees, but excluding all equipment operators, heavy mechanics, heavy mechanic helpers, temporary employees, office clerical employees employed at the headquarter's building, confidential employees, guards, and supervisors as defined in the Act.

4. Respondent's unilateral reduction of the amount paid into individual employee SEP accounts did not violate Section 8(a)(1) and (5) of the Act.

5. Respondent unilaterally laid off employees in order to reduce labor costs without notifying the Union or affording it an opportunity to bargain, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate and substantial relation to trade, traffic, and commerce, among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Board held in *LaPeer Foundry*, supra, that an unlawful failure to negotiate over a layoff decision in violation of Section 8(a)(5) of the Act requires that the employer's backpay liability run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, with appropriate interest. Since Respondent was not awarded the contract at the Redstone Arsenal beginning October 1, 1989, I shall order that backpay run, with appropriate interest, from the date of the layoff on March 7, 1989, until the date the contract between Respondent and the U.S. Army ceased on September 30, 1989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

## ORDER

The Respondent, Holmes & Narver/Morrison-Knudsen, Huntsville, Alabama, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees in order to reduce labor costs without first notifying the Union and affording it a reasonable opportunity to bargain about such a decision and its effect on employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees laid off on or about March 7, 1989, by paying them a sum of money equal to the amount each normally would have earned from the date of the layoff to September 30, 1989, when the contract between Respondent and U.S. Army terminated, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Notify the Union, in writing, that although it is impossible to fully restore the status quo ante due to the fact that Respondent no longer has a contract with the U.S. Army to operate and maintain the Redstone Arsenal, it is willing to meet and bargain with the Union to negotiate concerning the effect that the March 1989 layoff may have had on employees.

(c) Mail a copy of the attached notice marked ''Appendix'' on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, to each employee on its payroll at the Redstone Arsenal project on or about March 7, 1989, who were in the bargaining unit represented by the Union.[4]

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] Because Respondent no longer has the contract to operate and maintain the Redstone Arsenal, it is impossible to require Respondent to post the attached notice, which is the normal remedy in circumstances such as these. Accordingly, I am ordering Respondent to mail a copy of the attached notice to employees in the bargaining unit on the date of the layoff.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally lay off employees at the Redstone Arsenal in Huntsville, Alabama, in order to reduce labor costs without first notifying IBEW, Local Union 558 and UA Plumbers and Steamfitters, Local Union No. 377 and affording them a reasonable opportunity to bargain about such a decision and its effect on employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole employees laid off on or about March 7, 1989, by paying them a sum of money equal to the amount each normally would have earned from the date of the layoff to September 30, 1989, when our contract at the Redstone Arsenal terminated, less net interim earnings, with appropriate interest.

WE WILL notify the Union, in writing, that although it is impossible to fully restore the status quo ante due to the fact that we no longer have the contract with the U.S. Army to operate and maintain the Redstone Arsenal, we are willing to meet and bargain with the Union to negotiate concerning the effect that the March 1989 layoff may have had on employees.

HOLMES & NARVER/MORRISON-KNUDSEN